

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For the Period
From April 1, 1965
Through June 30, 1965

VOLUME 119

RICHMOND M. FLOWERS, Attorney General



T. O. "TILLIE" WALKER
E D WALKER

QUARTERLY REPORT
of the
ATTORNEY GENERAL

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A L A B A M A
For the Period
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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1965 through June 30, 1965, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

RICHMOND M. FLOWERS
Attorney General

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Deputy Attorney General

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Executive Assistant

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Mrs. Mary Lee Stapp

Mrs. Carol F. Miller

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Herbert Burson

William H. Burton, Jr.

B. Frank Loeb

James R. Payne

William C. Younger

OPINIONS

April 5, 1965

Honorable Ashford Todd
Judge of Probate
Madison County Court House
Huntsville, Alabama

Taxation — Filing Tax — Leases — Deed Tax

A Memorandum of Lease, which makes reference to the lease agreement, and contains the pertinent stipulations thereof, and which is sufficient to show the intent of the parties, must be treated as a lease for purposes of the deed privilege tax, provided the lease itself has not been previously recorded.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of March 19, 1965, is as follows:

"I am enclosing copy of MEMORANDUM OF LEASE filed for record in this office. Is this instrument subject to the deed tax levied by Section 618, Title 51, Code of Alabama 1940?"

The instrument sought to be recorded is entitled "Memorandum of Lease," and purports to be an agreement between the lessor and the lessee setting out the terms of a lease agreement between these parties, previously executed on June 12, 1964. A full legal description of the property is included, together with the primary term of the lease, privilege of renewal, and other stipulations. The only important detail missing from this memorandum is the amount of rental to be paid by the lessee to the lessor. This memorandum is, of course, signed and witnessed by both lessor and lessee. It is my understanding from additional information received by telephone that the lease agreement itself has never been recorded in the office of the Judge of Probate of Madison County, and so far as that office knows, there is no intention to do so. For the purpose of this opinion, I am assuming that the lease agreement has not been offered for record.

It is clear that the memorandum itself is not couched in the formal language of an indenture of lease, nor does it contain all of the recitals which a formal lease agreement would ordinarily contain. On the other hand, it is equally clear that should this instrument be recorded, without payment of deed tax, the parties to the memorandum would have succeeded in procuring for themselves the benefits of the recording statutes without paying for that privilege. While this office expresses

no opinion as to the effect of the recordation of this memorandum, it is obvious that such memorandum, if recorded with or without payment of the tax, would have an effect upon the title to this real estate in that it would provide abundant constructive notice of the existence of such lease.

In the case of *Hawkins v. Pure Oil Co.*, 232 Ala. 660, 169 So. 307, Justice Gardner, in reaching the conclusion that a deed purporting to convey legal title to all of the property of Wofford Oil Co. to Pure Oil Co. was subject to the deed tax, stated as follows:

"Had the purchase of all the property and assets of the Wofford Oil Company followed the ordinary course, the deed, which represented the culmination of the transaction, would, of course, have required the recording tax. The mere fact that the transaction took the more circuitous route of first a purchase of all the stock and then the deed does not change its character, but only the form of the transaction. So viewed, it may be seriously questioned that the deed here may be said to rest upon a mere nominal consideration, one of the essential features of the exception, but that the consideration in fact related to the original purchase, in which the parties had in mind some such deed as an evidence of the title thus acquired and for record purposes.

"But this aside, our conclusion is that, in any event, this is not a deed for perfection of title within the meaning of the exception. It is to preserve the evidence of the title and to place in record form the title already acquired. To such a deed the general rule, and not the exception in the statute, applies.

* * * * *

". . . The plain purpose of its recordation, therefore, is not for perfection of the title to real estate, as the exception reads, but the perfection of the record of the transaction. But for that privilege the statute exacts a tax, and the exception was not incorporated in the statute for the purpose of enabling one who has the legal title to thus gain the advantage of its recordation without its payment."

While we are not here dealing with the exception contained in Section 618, as amended, Title 51, Code of Alabama 1940, the language used by Justice Gardner is so striking by way of analogy to the situation here that we find it hard to overlook. To allow either the lessor or the lessee to record a memorandum such as the one in question here without payment of the tax, would be to open the flood gates, and anyone not wishing to record a deed or mortgage could procure the essential advantages thereof by merely recording a memorandum containing all of the essential elements of such deed or mortgage.

It may be argued that the memorandum does not convey real estate, or any interest therein, which is an essential requisite of the statute. The

answer to this contention is found in 32 Am.Jur. 47, Landlord and Tenant, Section 24, where it is stated:

"No particular form of words is necessary to constitute an instrument a lease and create the relation of landlord and tenant between parties. Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession, and the other come into it for such a determinate term, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose. The criterion is the intention of the parties, to be derived from the whole instrument or transaction."

It is, therefore, my opinion that the memorandum in question must be treated as a lease for purposes of the deed privilege tax and that, when recorded, such tax must be collected in the same manner as in the case of any other long term lease. You will, of course, have to determine, from any evidence which you deem necessary, the "present value" of the interest conveyed.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 8, 1965

Honorable Wylie Hickman
Judge of Probate
Etowah County
Gadsden, Alabama

Adoption — Consent of a minor parent under disabilities of non-age to the adoption of his or her infant child is voidable at the instance of the minor parent.

The minority of a parent constitutes an incapacity for purposes of consent to adoption under Title 27, § 3, Code of Alabama 1940 (Recompiled 1958).

Voidable consent of a minor parent under disabilities of non-age would not be aided by consent of his or her parents or guardian.

Opinion by Assistant Attorney General Carol Miller

Dear Judge Hickman:

Your letter of February 22, 1965, requesting the opinion of this office is as follows:

"There has been filed a petition of adoption on the part of the maternal grandparent for the infant child of the underage granddaughter and consent has been given for this adoption by both the mother and the father. My question arises from the fact that both parents are only sixteen years of age — my question is:

"Can the parents in the above situation give a consent that would be as valid as their consent would be if they were of age or must there be some other court action?"

In my opinion your question: "Can the parents in the above situation give a consent that would be as valid as their consent would be if they were of age," must be answered in the negative, and your further question as to whether there must be some other court action should be answered in the affirmative.

As you know, Title 27, Section 3, Code of Alabama 1940 (Recompiled 1958), provides in part as follows: "... The consent of a parent ... who is insane or otherwise incapacitated from giving such consent ... may be dispensed with" The question becomes whether the minority of the parents constitutes an incapacity contemplated in the statute. Under the common law, persons become *sui juris* at twenty-one years of age, but the legislature has full power to prescribe a different age. *Hutchinson v. Till*, 212 Ala. 64, 101 So. 676. The legislature has chosen to fix the age of majority at less than twenty-one years for certain purposes. For example, under Title 27, § 13, et seq., Code of Alabama 1940 (Recompiled 1958), provision is made for relieving minors over eighteen years of age from the disabilities of non-age; and under Title 34, § 76 of the Code, married women and widows over 18 years of age are relieved of the disabilities of minority. However, when such exceptions have not been created by statute, the disabilities of minority continue until an individual reaches twenty-one years of age.

Since the Alabama courts have not had occasion to interpret the quoted statute, it becomes helpful to look to other jurisdictions. Prior to 1960, the Georgia statute in regard to consent for adoption was virtually the same as the Alabama statute in that it provided that consent by parents is not required, *inter alia*, "... where a parent is insane or otherwise incapacitated from giving such consent. . ." In 1953 and 1959 the Georgia Supreme Court held, under that statute, that the agreement by a minor parent to the adoption of a child was not binding on the minor parent. *Walker v. Walker*, 209 Ga. 490, 74 S.E. 2d 66; *Springstead v. Cook*, 215 Ga. 154, 109 S.E. 2d 508. In the *Walker* case, a married mother fifteen years old signed an agreement to relin-

quish parental control of her child. The court stated: "Marriage does not remove the disabilities of infancy unless it is so provided for by statute. 43 C.J.S., Infants, Section 29, page 91. Therefore, since the Georgia law merely provides certain exceptions to the general rule as to contracts by infants and these do not expressly cover such a contract as here, it follows that the contract of this child is not binding upon her. See Code, Ch. 20-2." In 1959 the Georgia Supreme Court decided the *Springstead* case, holding that an alleged consent for adoption, which was signed by an infant wife, was not a valid release and surrender of her parental right for purposes of adoption. In 1960 the Georgia Legislature added sub-section 5 to Section 74-403, Ga. Code Ann., making the consent of minor parents valid, as follows: "Minor parents. — The parental consent when required by this section, may be given by the natural parents or parent of the child sought to be adopted irrespective of whether such natural parent, or either or both of them, have arrived at the age of 21 years. The parental consent given by minor natural parents shall be as binding upon them as if such parents were in all respects *sui juris*."

Regarding the disabilities of an infant, it is stated in 27 Am.Jur., Infants, Section 14: "If the statutes of a state or of the United States expressly permit a certain class of agreements to be made by infants, such statute, of course, settles the question and makes the agreement absolutely valid. In such a case, the right of avoidance of the contract does not exist." Section 31 of the same article: "Although in some early cases some agreements of discharge of claims of infants made by such infants were held void as being necessarily prejudicial to them, it is now well settled that agreements of discharge made by infants, such as an accord, compromise, or release of a claim upon a contract or for a tort or of a claim to an interest in an estate, and agreements relating to the discharge of future claims are voidable and subject to disaffirmance or affirmation." The 1854 Alabama case of *Ware v. Cartledge*, 24 Ala. 622, 60 Am.Dec. 489, is cited in the just quoted section. The case held that an infant on coming of age may avoid a contract compromising a tort claim. An agreement thus avoided becomes void *ab initio*. *McCarty v. Woodstock Iron Company*, 92 Ala. 463, 8 So. 417, 12 L.R.A. 136; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am.Rep. 418.

Numerous sources have been consulted in order to determine whether "incapacity," as used in our statute, includes the legal disabilities of minority. "Incapacity. Want of capacity; want of power or ability to take or dispose; want of legal ability to act . . ." *Black's Law Dictionary*, 4th Ed., 1951. "Incapacity. The want of a quality to do, give, transmit, or receive something." *The Cyclopedic Law Dictionary*, 3rd Ed., 1940. ". . . An infant's agreements are voidable but not void." *Regan v. Williams*, 220 Ala. 590, 127 So. 190, 68 A.L.R. 1182; *American Freehold Land Mtg. Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am.St.Rep. 38; *Manning v. Johnson*, 26 Ala. 446, 62 Am.Dec. 732.

An annotation appears in 138 A.L.R. 1042 stating in part: "As to minority of the party consenting to an adoption as a ground for revoca-

tion of such consent, there appears to be no direct authority. But note that in *Hebhardt v. Anderson* (1925), 7 Pa. D & C 139, the court stated: "In any event both papers [consent to adoption] are voidable and revocable by her [the mother] because she is a minor." The court in that case also stated that the mother's revocation must be implied from her bringing a habeas corpus proceeding to regain the child. It is noted that in the *Hebhardt* case, revocation was made before adoption proceedings were instituted or third party rights had intervened.

In 1891, the Supreme Court of Kansas had before it a habeas corpus proceeding involving the instant question. In *re Bush*, 47 Kan. 264, 27 Pac. 1003. In that case a seventeen year old unmarried mother had given consent for the adoption of her infant, and the child was adopted in accordance with the consent. Some three years later the mother sought to recover the child. The court refused to disturb the adoption, finding that the adoptive parents were suitable and that it would not be to the best interest of the child to make any change. Although the mother's petition did set up her minority at the time the consent was given, the court considered only the question of whether the adoptive parents were proper persons to have the care, custody, and education of the child. An interpretation of this case appearing in 2 C.J.S., Adoption of Children, Section 21, states that the adoption is not invalidated by the fact that the consent was given when the parent was a minor.

"Adoption is a status unknown to the common law, and can be accomplished only in accordance with the provisions of a statute. *Wilson v. Anderson*, 232 N.C. 212, 521, 59 S.E.2d 836, 61 S.E.2d 447, 18 A.L.R.2d 951." See A.L.R.2d Series Digest, Parent and Child, Section 16. The statutes in several of the states, e.g., New York, Colorado, Ohio, Pennsylvania, Florida, and Georgia, now make specific provision for consent by a minor parent.

In interpreting that state's statute, the Supreme Court of Minnesota stated, in *re Adoption of Anderson* (1951), 235 Minn. 192, 50 N.W.2d 278: "Was the mother, who had not reached her majority, being only seventeen years old, legally capable of consenting to the committal of her child to the guardianship of a placement association? . . . The statute as then worded provided for the consent of the unwed mother without any limitation upon the giving of that consent by reason of her minority. In the same section it is specifically provided that no child over the age of fourteen years shall be adopted without his consent, in other words, the Legislature was not unmindful of age qualifications but chose to make none as to the illegitimate mother. The age of legal capacity is wholly a matter of legislative regulation, and the disabilities of infancy may be removed for certain purposes at an earlier age than for others . . . It follows that the mother, though a minor — as the law then existed — had the capacity to consent to the adoption of her child. See 1 Am.Jur., Adoption of Children, Section 37."

A 1946 Florida case, *In re Brock*, 157 Fla. 291, 25 So.2d 659, concerned an eighteen year old unmarried mother who had given a written consent to the adoption of her child. The question presented to the Florida Supreme Court was: "May an unmarried mother who is a minor execute a valid consent under Chapter 21759, Acts of 1943, Section 72.14, Fla.Stats. 1941, so as to obviate the necessity of appointing a guardian ad litem to represent and secure process on her as contemplated by Section 72.13, Fla. Stats. 1941, and other applicable statutes relating to service of process on minors?" The court answered this question in the affirmative. The Florida statute under which this case was decided provides for consent by parents and there is no reference in the statute to parents who are "incapacitated."

"If original consent by parent of adoptive child was given by one legally incapable of giving it . . ., there would be 'good cause' for revocation of the consent by the parent." *In re Adoption of McKinzie*, (Mo. 1955), 275 S.W.2d 365. The pertinent Indiana statute, Burns' Ann. St., Section 3-120, is to the effect that the consent of a minor parent must be accompanied by the written approval of a licensed child placing agency or of the State Department of Public Welfare. Where the right to adoption was predicated solely on the written consent of the natural parents of the child and the natural mother was a minor when she signed the consent, the consent was ineffective when not accompanied by the agency approval required by statute. *In re Adoption of Chaney*, 238 Ind. 704, 150 N.E.2d 754. This case also held that a statute abolishing all legal disabilities of married women to make contracts did not remove the statutory requirement of written approval by a licensed child placing agency or the State Department of Public Welfare.

An exhaustive search of the *American Digest System* from its earliest volume to the present time has failed to reveal further decisions on the question propounded.

In Alabama it appears that a consent given by an infant parent sixteen years of age, whether or not married, would be voidable at the instance of the minor parent. As there is no provision in the Alabama statutes for making such consent binding, it seems clear that adding the consent of the minor parent's parents or guardian would give no weight to the voidable consent. If course, if parental rights were terminated under Chapter 7, Title 13, Code of Alabama 1940 (Recompiled 1958), the adoption would not rest on parental consent and the problem would thereby be avoided.

Yours very truly

RICHMOND M. FLOWERS
Attorney General

April 9, 1965

Hon. Ashford Todd
Judge of Probate
Madison County
Huntsville, Alabama

Cooperatives — Telephone — Mortgages.

Constitution of Alabama 1901, Section 234.

Under the authority of Title 18, Sections 51 and 59(3), Code of Alabama 1940, as amended, a cooperative may mortgage its property to the United States of America or any instrumentality thereof without obtaining the affirmative vote of two-thirds of all the members of the cooperative and without regard to Section 234 of the Constitution of Alabama 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 24, 1965, is as follows:

“Article 12, Section 234, Constitution of 1901, provides as follows:

“No corporation shall issue stocks or bonds except for money, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty days’ notice, given in pursuance of law.

“Title 18, Section 51, Code of Alabama, provides as follows:

“Disposition of property.—A cooperative may not sell, mortgage, lease or otherwise dispose of or encumber all or any substantial portion of its property unless such sale, mortgage, lease, or other disposition or encumbrance is authorized at a duly held meeting of the members thereof by the affirmative vote of not less than two-thirds of all of the members of the cooperative, and unless the notice of such proposed sale, mortgage, lease, or other disposition or encumbrance shall have been contained in the notice of the meeting; provided, however, that notwithstanding anything herein contained, or any other provisions of law, the board of trustees of a cooperative, without authorization by the members thereof, shall have full power and authority to authorize the execution and delivery of a mortgage or mortgages or a deed or deeds of trust upon, or the pledging or

encumbering of, any or all of the property, assets, rights, privileges, licenses, franchises, and permits of the cooperative, whether acquired or to be acquired, and wherever situated, as well as the revenues and income therefrom all upon such terms and conditions as the board of trustees shall determine, to secure any indebtedness of the cooperative to the United States of America or any instrumentality or agency thereof. (1939, p. 371).

“Question: May a Telephone Cooperative, organized under Title 18, Code of Alabama, in order to mortgage its property to the United States of America, do so by its Board of Trustees or Director, without the consent of the membership as required by Section 234 *supra*?

“The New Hope Telephone Cooperative of New Hope, Alabama, a cooperative organized under Title 18, is presently negotiating a loan from the United States Department of Agriculture (REA) and have posed the above question.

“Will appreciate your immediate attention and response.”

Before proceeding to answer your request, I wish to advise you that an opinion of this office would afford protection to no one, as the legality and validity of the mortgage proposed to be entered into between the New Hope Telephone Cooperative of New Hope, Alabama, and the United State Department of Agriculture (REA) is a question which addresses itself to the contracting parties and not to this office.

With the above premise, my answer to your inquiry is in the affirmative.

Section 234 of the Constitution of Alabama 1901 has to do with stocks and bonds of a corporation with the proviso that the stock and bonded indebtedness of a corporation shall not be increased except under general law, nor without consent of the persons holding the largest amount in value of the stock. This section is dealing with increasing the bonded indebtedness of the corporation and has no bearing whatsoever upon a corporation mortgaging its assets. As a matter of fact, under this section of the Constitution, the majority of the stockholders of a corporation have no power or authority to permit or not to permit a corporation to mortgage its assets. This authority comes from the general laws of the State of Alabama or from the charter of the particular corporation in question.

Under the provisions of Title 18, Sections 51 and 59(3), Code of Alabama 1940, as amended, it is my opinion that the board of trustees of a cooperative formed under the provisions of said title has the

authority to mortgage its assets to the United States of America or any instrumentality or agency thereof without first obtaining authorization from its membership and without regard to Section 234 of the Constitution of Alabama 1901.

I reiterate that this opinion affords protection to no one and the parties to the contract, mortgage or deed of trust should obtain an opinion from their legal counsel as to the legality thereof.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 14, 1965

Dr. Ira L. Myers, Health Officer
State Department of Public Health
State Office Building
Montgomery, Alabama 36104

State Board of Health — Governor

The State Board of Health is the single State agency in Alabama which has authority to receive and administer funds appropriated by the Congress of the United States under Public Law 88-164 for the construction of facilities for the mentally retarded.

Opinion by Assistant Attorney General Robert Miller.

Dear Sir:

Your request for an official opinion, dated March 16, 1965, is as follows:

“In order to take advantage of funds appropriated by the Congress of the United States for construction of public and other nonprofit facilities for the mentally retarded, it is necessary that the State of Alabama designate a single State agency as the sole agency for the administration, or the supervision of the administration, of a State plan designed to carry out the State’s purposes in regard to providing facilities and services for the mentally retarded.

“By EXECUTIVE ORDER NO. 16 the Governor has designated the State Board of Health as the required single State agency.

"It is requested that you give an official opinion as to whether the State Board of Health, so designated by the Governor, has the authority to supervise and administer the State plan as required by Public Law 88-164, Section 134; the pertinent part of which states: " 'Section 134. (a) After such regulations have been issued, any State desiring to take advantage of this part shall submit a State plan for carrying out its purposes. Such State plan must —

* * * * *

" '(2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) hereof will have authority to carry out such plan in conformity with this part;'

"For your convenience a copy of EXECUTIVE ORDER NO. 16 is attached to this letter."

EXECUTIVE ORDER NO. 16 states:

"WHEREAS, by virtue of the Mental Retardation Facilities Construction Act (Title 1 of Public Law 88-164) enacted by the Congress of the United States of America and effective October 31, 1963, appropriations have been made available to states for construction of research centers and facilities for the mentally retarded; and

"WHEREAS, authority has been vested in me by the Legislature of Alabama to accept from the Federal Government or any agency or instrumentality thereof in the name of and for the State of Alabama grants and advances of funds and real and other personal property for any purpose of the State of Alabama not contrary to the Constitution of Alabama (See Act No. 49, Acts of Alabama 1945, p. 51, Title 55, Section 180(1), Code of Alabama 1940); and

"WHEREAS, authority has been vested in me by the Legislature of Alabama to delegate to any state agency by executive order such power and authority to enable such State agency to participate fully in advances and grants made available to it by the Federal Government (See Act No. 49 and Act No. 60, Acts of Alabama 1945, p. 51 and 60, Title 55, Sections 180(1), 180(2), Code of Alabama 1940); and

"WHEREAS, the Legislature of Alabama has further authorized and empowered me to give to any State agency by executive order such powers and duties as are not in conflict with the Constitution of Alabama and not specifically prohibited by the existing statutes of Alabama as may be required to implement in Alabama any law, order, rule, regulation, program or plan promulgated by the Federal Government or any agency or instrumentality thereof as may be re-

quired in my judgment for the welfare of the people of Alabama (Act No. 60, General Acts of Alabama 1945, p. 60, Title 55, Section 180(2), Code of Alabama (1940); and

"WHEREAS, I do specifically find that the problems of mental retardation are serious problems for the citizens of Alabama, that research is needed in order to solve these problems and that facilities are needed for treatment, care and education of those people of Alabama that are mentally retarded;

"NOW THEREFORE, I as Governor of Alabama do hereby order:

"1. THAT the State Board of Health of the State of Alabama be and is hereby ordered to be the single State agency with sole power to adopt, administer and supervise the State plan for Mental Retardation in conformity with the Mental Retardation Facilities Construction Act, Title 1, Public Law 88-164, effective October 31, 1963.

"2. THAT the State Board of Health in addition to such powers as have heretofore been vested in it by the State of Alabama is in addition given any other powers that may be convenient to it to carry out the tasks imposed on it by virtue of the requirements of the Mental Retardation Facilities Construction Act and such regulations as have been or may be promulgated by the Department of Health, Education and Welfare under authority of such Act.

"3. THAT all officers, employees and agents of the State of Alabama and all divisions, departments, commissions, subdivisions and agencies of the government thereof are ordered to confer, plan and cooperate with the State Board of Health, its agents and employees to the end that said State Board of Health may be able to execute the duties imposed by me on it hereby to meet the requirements of the Mental Retardation Facilities Construction Act.

"4. The State Board of Health is given the further duty and power to appoint a State Advisory Council as required by the Mental Retardation Facilities Construction Act.

"5. The State Board of Health shall have the additional power to make reasonable rules and regulations for the administration of the State Plan for Mental Retardation including rules and regulations for administrative hearings and such other reasonable rules and regulations as would be useful in carrying out the requirements of this Executive Order and of the Mental Retardation Facilities Construction Act.

"Done this the 20th day of January, 1965."

The authority of the Governor of Alabama to issue EXECUTIVE ORDER NO. 16 is found in Act No. 45 and Act No. 60, Acts of Alabama 1945, p. 51 and p. 60. The pertinent powers vested in the Governor by these Acts are sufficiently covered in Section 1 of Act No. 60, which is set out here at length.

"Section 1. The Governor is hereby authorized and empowered to give by his executive order, to existing agencies and instrumentalities of the State government such powers and duties, which are not in conflict with the Constitution of Alabama and which are not specifically prohibited by the then existing statutes, as may be required to implement in Alabama any law, order, rule, regulation, program, or plan promulgated by the Federal Government or any agency or instrumentality thereof, for the welfare of the people of the United States or as may be required, in his judgment, for the welfare of the people of Alabama."

The intent of these acts is to permit the State of Alabama to participate fully in grants made available to it by the Federal Government. See Section 2, Act No. 49, Acts of Alabama 1945, p. 51.

Thus, it seems clear that the Governor of Alabama has the authority, and has exercised such authority, to designate the State Board of Health as the single State agency to receive funds appropriated by the Congress of the United States under Public Law 88-164 and to administer the allocation of such funds to qualified agencies for the construction of facilities for the mentally retarded.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 23, 1965

Honorable W. M. Cousins, Jr.
Judge of Probate
Elmore County Court House
Wetumpka, Alabama

Taxation — Filing Tax — Mortgages

1. In order for a mortgage to fall within the provisions of Title 51, Section 619(d), as amended, Code of Alabama, Recompiled 1958, the debt secured by the original mortgage must remain unchanged, both as to amount and as to the date of maturity, and in addition, mortgage tax must have been paid on the original indebtedness.

2. When the time for payment of indebtedness secured by a mortgage is extended or renewed, and the extension or renewal agreement is offered for record, mortgage privilege tax shall be paid upon the amount of indebtedness so extended or renewed.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of March 24, 1965, is as follows:

"I am enclosing herewith a copy of a mortgage filed for record in this office on March 22, 1965. There seems to be some question or doubt as to the amount of mortgage tax to be paid upon the filing of this mortgage.

"You will observe the following notation at the top of the mortgage: 'This mortgage for additional money, replaces Mortgage recorded at V.414, Page 81.'; however, there appears to be nothing in this mortgage to show the amount of additional money, and the notation is to the effect that it replaces the former mortgage mentioned in the notation.

"The prior mortgage, recorded in Book 414 at page 81, secures the principal sum of \$12,500.00. The new mortgage in question secures the principal sum of \$19,000.00. The mortgage tax was paid on the prior mortgage, but the unpaid amount of the original debt does not appear in the new mortgage and it appears that the maturity date is changed.

"I am also enclosing herewith a copy of the prior mortgage for your inspection, and request your opinion on the following questions:

"1. How much mortgage filing tax should be collected on the new mortgage?

"2. Under what circumstances should filing tax, collected on a former mortgage, be allowed as credit on the mortgage filing tax on a future mortgage?"

Briefly reiterated, the facts in this case are as follows. A mortgage from J. Wilson Jolly, Sr. and wife to First Federal Savings and Loan Association of Tallassee, Alabama, dated May 29, 1964, was recorded in your office on June 25, 1964. The recited indebtedness was in the amount of \$12,500, with the final maturity date being June 1, 1974. Mortgage tax was paid to your office upon the full amount of indebtedness recited therein.

A second mortgage between the same parties and dated March 16, 1965, is now in your office for recordation and you wish to know how much mortgage tax is due to be collected. The second mortgage conveys the same property as that conveyed by the first mortgage; however, the

amount of indebtedness recited is \$19,000, and the date of final maturity is March 16, 1975. In addition, the mortgage recites at the top of page 1: "This mortgage for additional money, replaces Mortgage recorded at V. 414, Page 81."

It is at once obvious that the mortgage in question does not fall within the provisions of Section 619(d), Title 51, Code of Alabama, Recompiled 1958, and is therefore not exempt from mortgage tax. In order for such instrument to come within the provisions of subsection "d", supra, the debt secured by the original mortgage must remain unchanged both as to amount and as to maturity. Quarterly Report of the Attorney General, Vol. 24, p. 234; Quarterly Report of the Attorney General, Vol. 64, p. 57. In this case, both the amount of indebtedness and the time of maturity are different from the original mortgage.

It does appear that the instrument in question is governed by Title 51, Section 619(f), Code of Alabama, Recompiled 1958, which reads in pertinent part as follows:

"When the time for the payment of the indebtedness secured by any such mortgage, deed of trust, contract of conditional sale, or other instrument in the nature of a mortgage, is extended or renewed, and the extension or renewal contract is offered for record the tax required in this section shall be paid on the amount of indebtedness so extended or renewed; and the same shall be governed in all respects by the provisions of this article."

As you point out in your letter, the second mortgage does not show just what part of the original \$12,500 indebtedness had been paid at the time such second mortgage (the instrument now in question) was brought in for recordation. However, such information can very easily be obtained by you and as to the amount of indebtedness previously paid, there would be no tax due. Tax would be due on so much of the \$12,500 which is now being extended or renewed. Quarterly Report of the Attorney General, Vol. 8, p. 227.

In addition, mortgage tax is due upon the difference between the \$12,500 indebtedness recited in the original mortgage and the \$19,000 recited in the second mortgage. This \$6,500 is new indebtedness upon which mortgage tax would be due just as if there were a new mortgage being filed in your office reciting this amount of indebtedness.

In conclusion then, it is my opinion that you must collect mortgage tax upon the full amount of indebtedness recited in the second mortgage (\$19,000) except for that part which has been previously paid and is not now being extended or renewed.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 23, 1965

Dr. William D. Spears, Chairman
Board of Examiners in Psychology
Department of Psychology
School of Education
Auburn University
Auburn, Alabama

Psychologists — Alabama Board of Examiners in Psychology

1. The Board of Examiners in Psychology may refuse to grant a license, without examination, to an applicant who it finds not to be qualified, even if he has practiced psychology for three years full time prior to the effective date of the Act.

2. Before granting an applicant a license without an examination, the Board would be required to find that the applicant's experience while practicing psychology was of a nature satisfactory to the Board.

3. The three years full time practice for which the Board may waive the requirement of an examination must have occurred between October 1, 1960, and September 30, 1963.

4. An applicant who does not have a doctorate in psychology, or a closely allied field, and whose experience is not satisfactory to the Board is ineligible for a license.

5. The Board may at any time waive the requirement of an examination and issue a license to any person who meets all the other requirements of the law and satisfies the Board that he is also qualified by reason of his educational and professional attainments.

Opinion by Assistant Attorney General Robert F. Miller

Dear Sir:

Your request for an official opinion bearing date of February 2, 1965, is as follows:

"As chairman of the State Board of Examiners in Psychology I am requesting a clarification of certain sections of the Law which established this Board, Act No. 535, Regular Session, 1963. I shall

quote parts of Sections 5 and 8 from this Law and then ask specific questions.

"Section 5. . . 'A candidate for such license shall furnish the Board with satisfactory evidence that (a) he is of good moral character; (b) is at least 21 years of age; (c) has received a doctorate degree in Psychology from an educational institution accredited and recognized by national and regional accrediting agencies as maintaining satisfactory standards, or, in lieu of said degree, a doctorate degree in a closely allied field, if the training received therefore is substantially similar to that required of doctorates obtained from departments of psychology; (d) is competent in psychology as shown by passing such examinations, written or oral, or both as the Board will prescribe; (e) is not engaged in unethical practice as defined in the Code of Ethics of the American Psychological Association; (f) has not within the preceding six months failed an examination given by the Board, provided that the Board may in its discretion accept satisfactory substitute training and experience in lieu of that prescribed in subsection (c) above for a period of two years following the effective date of this Act.'

"Section 8. . . 'For a period of two years from the effective date of this Act the Board may waive either or both an assembled examination or the other requirements of Section 5 if it deems such action to be in the public interest; and may grant the appropriate license upon payment of the required fee to any person who is qualified by experience to practice psychology, and who has engaged in such practice of a nature satisfactory to the Board for at least three years full time or its equivalent, within three years prior to the effective date of this Act. . . '

"The Board does not know the proper interpretation of Section 8 relative to certain borderline applications for licensure. I assume that phrases such as 'in the public interest' have accepted legal interpretations in cases such as this. If a person has worked as a psychologist for three years prior to the effective date of this Act, is it implied that he should be granted licensure regardless of his qualification? Or, if he has completed his master's degree in psychology with such experience, is it advisable to grant him a license during this two year period? How free are we as a Board to determine whether or not a person's experience properly qualifies as psychological experience? Does the clause 'within three years prior to the effective date of this Act' mean that the three years of experience must totally have been within these three years or could it mean that at least some of the experience must have been within three years prior to the effective date of the Act?

"If we choose to consider a person's experience as non-psychological and that person does not have a doctorate in psychology, can we

classify him as ineligible under the Law and refuse to examine him, subject, of course, to appeal as explained in other sections of the Act? Since we are approving several clear-cut cases which we are sure should be included under the exceptions in Section 8, and these persons were passed without examinations, is it defensible for us to require questionable cases to undergo an examination? If so, are we free to evaluate such an examination by the same criteria that will be used after the first two years the Law is in effect?

"I hope that these questions will not result in undue inconvenience on your part. If you feel that the Board or its representatives should meet with you to discuss these questions, please let me know."

Act No. 535, Acts of Alabama 1963, is found in Title 46, Sections 297(23) to 297(37), Code of Alabama 1940, Recompiled 1958, in 1963 Pocket Part. Sections 5 and 8 quoted in your letter appear in Title 46 of the Code as Sections 297(27) and 297(30).

Your first question is as follows: "If a person has worked as a psychologist for three years prior to the effective date of this Act, is it implied that he should be granted licensure regardless of his qualification?"

The answer to this question is "no," because this is a matter of discretion which the legislature has delegated to the Board. Section 8 of the Act states, ". . . the Board **may** waive either or both an assembled examination or the other requirements of Section 5 if it deems such action to be in the public interest;" (Emphasis added) The legislature did not use the word "shall," but instead used the word "may." The word "shall" would have indicated that the Board had no discretion, and would be required to waive an examination and the requirements set out in Section 5, but when it uses the word "may" then the Board uses its discretion. It must be clearly understood, however, that the Board does not waive said examination or other requirements unless "it deems such action to be in the public interest."

As you suggest in your letter the term "in the public interest" does have legal significance. Action taken "in the public interest" would be equivalent to action taken "compatible with public interest" or "in consideration of public interest." "Interest" in law is a right, so what we are concerned with here is a public right, and although the Board has been given a broad discretion, the action which the Board takes in regard to waiving an examination or other requirements must be taken so that the rights of the community at large are kept in mind when the examination is required or waived. There is an implication that knowledge, prudence, and discernment will be exercised by the Board so that the results will be correct and proper when considering the community at large rather than any individual or mere class of persons.

Your second question may be rephrased as follows: If a person has worked as a psychologist for three years prior to the passage of this legislation and he has completed a masters degree in psychology, is it advisable to grant him a license?

These first four questions relate to giving a person a license without an examination. The first sentence of Section 8 is the "grandfather clause" and you are asking how to determine whether a person comes under this clause and, therefore, would not have to take an examination. The main factor you are to consider is experience. The statute states, "...the board...may grant the appropriate license...to any person who is qualified by **experience** to practice psychology, and who has engaged in **such practice** of a nature satisfactory to the board for at least three years full time or its equivalent, ..." (Emphasis added)

Just what is this experience? Does it include academic experience? Notice that any person who is to receive a license without an examination must be "qualified by experience to practice psychology." Also, notice that the words "such practice," underscored above, refer to the practice of psychology, or, in other words, the public practice of psychology as a profession. Nothing is stated in this first sentence of Section 8 about being qualified by reason of academic training. It appears, therefore, that even if a person had a masters degree in psychology he would not be eligible for a license without examination if he did not have the required experience. The Board would be required to make a reasonable finding as to the nature of the applicant's experience, keeping in mind that this means the practice of psychology, and also considering the public interest as contrasted to the interest of any individual. Thus a person may have practiced psychology as a profession for three years full time or its equivalent, but if such practice is not of a nature satisfactory to the Board, it may not grant the license without an examination even if the applicant has a masters degree in psychology.

The next question may be stated, "How free are we as a Board to determine whether or not a person's experience properly qualifies as psychological experience?" The Board is not free to be arbitrary, capricious, or unreasonable, but it is completely free to exercise its best judgment in accordance with the principles regarding discretion of the Board which have been set out above.

The next question is as follows: "Does the clause 'within three years prior to the effective date of this Act' mean that the three years of experience must totally have been within these three years or could it mean that at least some of the experience must have been within three years prior to the effective date of the Act?" The statute says that the practice which the Board considers must extend "for at least three years full time or its equivalent, within three years prior to the effective date of this Chapter." This means that the applicant must have completed three years full time or its equivalent engaged in such practice that

would be satisfactory to the Board within the three years between the date October 1, 1960, and September 30, 1963. It is evident that the legislature intended for the practice to be three years of full time experience ending September 30, 1963. If only a part of this experience need be had during the three years prior to the effective date of the Act, then it would have been easy to have stated the requirement so as to have the practice end within a three-year period, or, more simply yet, the phrase "within three years prior to the effective date of this Chapter" could have been omitted.

Your next question is: "If we choose to consider a person's experience as non-psychological, and that person does not have a doctorate in psychology, can we classify him as ineligible under the law and refuse to examine him, subject, of course, to appeal as explained in other sections of this Act?"

Section 5 of the Act sets out the requirements that an applicant for an examination must have. Ordinarily, it would be required that he have a doctorate degree in psychology or in a closely allied field unless the Board would, in its discretion, prior to October 1, 1965, accept the applicant's experience in lieu of the doctorate degree. After October 1, 1965, the Board would lose its discretion to accept experience as a substitute for academic training, and, of course, if a person's experience is not acceptable to the Board because being non-psychological, then there is no way for the person to qualify for the examination and it will be proper to classify him as ineligible.

Since discussing the previous questions, I think it is clear by this time that the answers to the last two questions would be in the affirmative.

It is not only defensible, but required that the Board consider each case and arrive at a reasonable judgment on each applicant with regard to his qualifications and if he does not qualify for an exemption in the judgment of the Board then he will be required to take an examination if he can, in fact, qualify for the examination under the requirements of Section 5.

As to the last question there is nothing in the law that indicates that the Board's standard criteria should be changed after October 1, 1965. It should be remembered, however, that, before or after that date, the Board may in its sound discretion waive the requirement of an examination of any person who is qualified by "educational and professional attainments to the satisfaction of the Board if it deems such action to be in the public interest."

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 27, 1965

Hon. S. K. Adams
Judge of Probate
Dale County Courthouse
Ozark, Alabama

Licenses Taxes — House Trailers — Soldiers' and Sailors'
Civil Relief Act of 1940.

1. Under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.A., App., Section 574) a house trailer owned by a nonresident serviceman stationed in Alabama under military or naval orders, would not be subject to the license levied on house trailers in this State under Act No. 44, Special Session 1961, as amended by Act No. 159, Special Session 1962, if such serviceman has licensed the house trailer for the current year as required in the State, territory, possession, or district of which he is a resident.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of March 31, 1965, is as follows:

"We are having a great number of military personnel living in the Daleville Community that are protesting the payment of the \$3.00 Mobile Home Trailer tag. The information that we have is a bit confusing. I would certainly appreciate you giving us an opinion whether these soldiers living off the military reservation should buy this \$3.00 tag. We know that they do not have to pay ad valorem tax on their trailers providing they do not live in Alabama."

It is presumed that all of the military personnel to whom you refer are nonresidents of this State and reside in Alabama temporarily only because of military orders and that they own and use themselves the house trailers to which you refer.

The license on house trailers is imposed by Act No. 44, Special Session of the Alabama Legislature 1961, as amended by Act No. 159, Special Session 1962 (Pocket Part, Title 51, Section 704(1), et seq., Code of Alabama 1940, Recompiled 1958). This license statute would ordinarily include all house trailers situated or located in this State, whether operated upon the highways or not during the license year, except house trailers which have been permanently affixed to real estate and have become a part of the real estate and are subject to ad valorem taxes as a part

of the realty. Moreover, as a prerequisite to the issuance of the license by the probate judge for house trailers in this State under Act No. 44, supra, the owner must have first assessed the trailer with the tax assessor as personal property and have paid the ad valorem taxes thereon to the tax collector, if such ad valorem taxes are due, as is required under Act No. 44, as amended by Act No. 159, supra. Quarterly Report of Attorney General, Vol. 113, pages 65 and 67, respectively.

House trailers not permanently affixed to real estate are clearly personal property. 51 C.J.S., Section 395, page 1138; Quarterly Report of Attorney General, Vol. 113, pages 65 and 67, respectively. They are also included within the term "motor vehicle," as it is defined in Title 51, Section 692(a), Code of Alabama 1940, Recompiled 1958. See also *Snapp v. Neal* (Miss. 1964), 164 So. 2d 752.

The military personnel, however, to whom you refer being non-residents of Alabama who reside here temporarily only because of military orders clearly come within the scope of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.A., Appendix, Section 574), as amended by Public Law 87 - 771 on October 9, 1962, 76 Stat. 768.

Section 574, as amended, of the Soldiers' and Sailors' Civil Relief Act of 1940 is divided into two subsections. Subsection (1) provides insofar as it is material here, that the "personal property" of such non-resident servicemen absent from their home state because of military orders, shall not be deemed to have a situs "for the purpose of taxation" in any state other than their home state and state of residency. This was said to be true even though such servicemen, while under military orders, take their personal property with them to another state. Thus, neither their personal property nor the use thereof is said to be taxable in accordance with subsection (1) of Section 574, supra, except by their home state. Subsection (2), however, as we shall see, contains a very significant exception to this.

Subsection 2 of Section 574, supra, provides, as follows:

"When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof; **Provided, that the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid.**" (Emphasis supplied.)

It is, therefore, my opinion that a house trailer owned by a non-resident serviceman, and situated in Alabama only because such serviceman is here under military orders would under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, not be subject to the license

levied in this State on house trailers under Act No. 44, as amended, supra, if such serviceman has licensed the house trailer for the current license year as required by the State, territory, possession, or district of which he is a resident. If the serviceman has not met such requirement, then he would be due to pay the license levied on the house trailer in this State.

The provisions of the Soldiers' and Sailors' Civil Relief Act, of course, would not apply in any case where the serviceman does not own the trailer involved and merely rents it, nor would the Act apply in any case, as is provided in Subsection (1) of Section 574, supra, where the serviceman uses the house trailer in this State in any trade or business.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 29, 1965

Honorable John F. Watkins
Legal Counsel
Alabama League of Municipalities
24 South Hull Street
Montgomery, Alabama

Taxation — Sales Tax — Municipalities — Opinions
Overruled, Modified or Distinguished

1. The ordinance of City of Fayette, which levies a "sales" or "gross receipts" tax upon persons engaged in business of selling tangible personal property in the City of Fayette, is not broad enough to include within the measure of the tax gross receipts from sales made outside the City.
2. The opinion of this office contained in Quarterly Report of the Attorney General, Vol. 112, p. 33, insofar as it conflicts with this opinion, is hereby overruled.
3. The informal opinion of this office rendered to you on February 28, 1963, insofar as it conflicts with this opinion, is hereby overruled.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of March 24, 1965, is as follows:

"On February 26, 1965, your office rendered an opinion to Hon. David M. Enslen ruling that a municipal sales (gross receipts license) tax is not applicable to sales made by a local automobile dealer to a purchaser outside of the municipality and police jurisdiction of the municipality. This opinion does not recognize or overrule any prior opinions rendered by your office.

"On February 28, 1963, your office rendered an opinion to the Alabama League of Municipalities ruling that a municipal sales tax is actually a privilege license tax based upon gross receipts derived from the business, and that such a tax is not a true sales tax which is levied upon the customer. On this basis the opinion ruled that a so-called municipal sales tax imposes a tax upon sales of merchandise by a local merchant whether the delivery of such merchandise is made to the customer within or outside of the corporate limits of the municipality. Citing *Ingalls Iron Works Company v. City of Birmingham*, 27 So.2d 788; *Gotlieb et al. v. City of Birmingham*, 11 So.2d 363; and other cases.

"It is our belief that the opinion rendered to this office is correct, and the opinion rendered to Mr. Enslen on February 26 of this year is in error, and we respectfully request that your office reconsider the Enslen opinion."

In the opinion of February 26, 1965, I held that under the City of Fayette sales or gross receipts tax, where the sale is made outside the City of Fayette, such sale does not fall within the levy of the City ordinance. Having carefully re-examined the ordinance itself, and the pertinent authorities, I still feel that the opinion to Mr. Enslen is correct.

That opinion did not go into the question of whether or not the City of Fayette had the authority to so frame its ordinance as to include within the measure of the tax gross receipts from sales made both within and without the City. Nor am I expressing any official opinion on this question now. The statute (Title 37, Section 735, Code of Alabama, Recompiled 1958) does not expressly grant this authority, but it does not deny it. The cases of *Gotlieb v. City of Birmingham*, 243 Ala. 579, 11 So.2d 363, and *Ingalls Iron Works Co. v. City of Birmingham*, 248 Ala. 417, 27 So.2d 788, seem to indicate that cities may have such power so long as there is no conflict with Federal or State Constitutions.

What I am ruling now is that the City of Fayette ordinance was not framed in such a manner as to include within the measure of the tax

gross receipts from sales made outside the City. You will note that the caption, or title, of the ordinance reads as follows:

"An ordinance levying a privilege or license tax against persons, firms, or corporations engaging in the business of selling tangible personal property at retail in the City of Fayette, Alabama, or within the police jurisdiction thereof, providing for the collection thereof, providing penalties for the violation of this ordinance, and repealing ordinance of the City adopted on February 7, 1949. No. 1949-4." (Emphasis added)

Section 2(a) of the ordinance, which is the levying section, reads, in pertinent part, as follows:

"Section 2. Levy of Tax in the City. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege and license tax against the person on account of the business activities and in the amounts of to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows:

"(a). Upon every person engaged or continuing within the City in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, . . . an amount equal to one percent (1%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. . . ."

It is significant that this section fails to specifically include gross receipts from sales made outside the City. It does not necessarily exclude them; it is silent. The general rule of construction, as applied in the *Gotlieb* case, is that taxing statutes are to be strictly construed against the taxing power; and this rule is also applicable to municipal ordinances of this character. *Anderson v. City of Birmingham*, 205 Ala. 604, 88 So. 900.

Since the title of the ordinance here under consideration indicates clearly that the selling of tangible personal property must be in the City of Fayette, and the body of the ordinance does not expressly negate this intent, it is my conclusion that such ordinance is not broad enough to cover gross receipts from sales made outside the City. It is my further opinion that this conclusion is adequately supported by the *Gotlieb* case, *supra*, even though it has been cited in several instances as having a different meaning.

The opinion of this office contained in Quarterly Report of the Attorney General, Vol. 112, p. 33, insofar as it conflicts with what has been said above, is erroneous and is hereby overruled.

The opinion of this office, which was written to you on February 28, 1963 with reference to the same question is also overruled insofar as it conflicts with the opinion expressed herein.

I, therefore, conclude that the previous opinion of February 26, 1965, to the Honorable David M. Enslen is correct, and is hereby reaffirmed.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 30, 1965

Honorable Cecil White
Clerk, City of Monroeville
Monroeville, Alabama

Appropriations — Funds — Municipalities — Property.

1. The City of Monroeville may make appropriations from its General Fund to its Park and Recreation Fund to be used to construct a municipal swimming pool.
2. The City of Monroeville must acquire the property upon which it constructs a municipal swimming pool, either by purchase, donation or lease.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of March 24, 1965, is as follows:

“The City of Monroeville created a Park & Recreation Board several years ago under authority of Act No. 174, H. B. # 491, pages 222-228, 1953 Regular Session of the Legislature of Alabama. Regular appropriations from the General Fund of the City of Monroeville have been made each year to be used by the Board in carrying on a recreation program in Monroeville.

“The local Chamber of Commerce has asked the City Council to appropriate some \$20,000 over a period of years, to build a swimming pool for our Negro citizens. The pool, if constructed, would be located either on property purchased by the City or on Public School property. No revenues would be derived from the pool by the City. All charges made for swimming would go for utilities and upkeep.

"My question to you is: Can the City legally appropriate monies from the General Fund for this purpose?"

Reference is also made to our telephone conversation of April 23, 1965, in which you stated that the proposed swimming pool would be operated by the Park and Recreation Board of the City of Monroeville. You further stated that the City has abandoned its proposal to construct said swimming pool on public school property and asked whether the City must own or own an interest in the property upon which said pool is to be constructed.

The Park and Recreation Board of the City of Monroeville was created and is controlled by Act No. 174, Acts of Alabama 1953, page 222.

Section 9 of Act No. 174, *supra*, provides that said City shall make an annual appropriation to its Park and Recreation Fund and may from time to time make additional appropriations to such fund.

Therefore, I am of the opinion that the City of Monroeville may make appropriations from its General Fund to its Park and Recreation Fund to be used to construct the swimming pool to which your request refers.

Under the provisions of Section 3 of Act No. 174, *supra*, the City of Monroeville, by and through its Park and Recreation Board, may accept donations of both real and personal property to be used for recreational purposes.

Section 4 of said Act authorizes said City, upon the recommendation of its Park and Recreation Board, to purchase or lease real property for park or playground purposes.

Construing Sections 3 and 4 of Act No. 174, *supra*, together with the legislative intent expressed by said Act as a whole, I am of the opinion that the City of Monroeville must either acquire title to or lease the property upon which it proposes to construct the swimming pool to which your request refers.

Very truly yours.

RICHMOND M. FLOWERS
Attorney General

May 3, 1965

Honorable David M. Cochran
Judge of Probate
Tuscaloosa County
Tuscaloosa, Alabama

Taxation — Ad Valorem Taxes

Owner of real property on October 1, 1963 is personally liable for ad valorem tax on such property for the tax year 1964 (October 1, 1963 — September 30, 1964) regardless of what may occur as to its ownership thereafter.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion dated April 27, 1965, is as follows:

"Re: Request for Attorney General's Opinion on question as to liability of landowners for ad valorem taxes for the tax year 1964 on property owned by them on 1 October 1963 and subsequently deeded to the State of Alabama.

"Certain landowners here in Tuscaloosa County, Alabama, have questioned their respective liability for ad valorem taxes on property which they owned on 1 October 1963 and which they subsequently conveyed to the State of Alabama for roadway purposes. For your information we enclose herewith the following deeds:

"1. Jimmie D. Crawford and Virginia M. Crawford to State of Alabama, dated 13 December 1963, recorded in Deed Book 497 at Page 619.

"2. James S. Williams and Jean Hicks Williams to State of Alabama, dated 22 January 1964, recorded in Deed Book 498 at Page 641.

"3. Charles A. Long and Lois M. Long to State of Alabama, dated 24 January 1964, recorded in Deed Book 498 at page 758.

"4. James P. Christian, Jr., and Mary A. Christian to State of Alabama, dated 25 April 1964, recorded in Deed Book 502 at page 9.

"You will note that the first deed described above is a right-of-way deed, and the others are deeds in fee simple. These landowners have stated to Mr. James R. Maxwell, Tax Collector of Tuscaloosa County, Alabama, that they were promised by officials of the State Highway Department that they would not owe any further taxes on this property in the event that deeds were signed. We have contacted the representatives of the State Highway Department who were

accused of making this statement as to liability for taxation and they deny this emphatically. They state that the landowners were told that they would owe these taxes which became due and payable on 1 October 1964.

"Under these circumstances, I would appreciate your advising me whether there is any way that we can relieve these taxpayers of liability for ad valorem taxes on the property which has been deeded to the State of Alabama. We have promised these taxpayers that we would propound this question to you, and we would appreciate very much your giving us a prompt reply thereto."

Your question has been answered in the negative by the Courts and previous opinions rendered by this office.

Since the property involved in the four deeds referred to was owned by the respective individuals mentioned in each deed on October 1, 1963, the tax or law day, each piece of property was due to be assessed to each respective owner and the owner is personally liable for the ad valorem tax on such property for the tax year October 1, 1963-September 30, 1964 regardless of what may occur as to its ownership thereafter or its physical status. Title 51, Sections 39 and 884, Code of Alabama 1940, Recompiled 1958; *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527; *U. S. v. State of Alabama*, 313 U.S. 274, 61 S. Ct. 1011; Quarterly Report of Attorney General, Vol. 115, page 88. The personal property of each owner is subject to levy and sale in order to satisfy the lien on the real property. Title 51, Section 201, Code of Alabama 1940, Recompiled 1958. What advice or promise, if any, given or made by officials of the Highway Department cannot estop the State from collecting state revenue legally due. *State v. Maddox Tractor & Equipment Co.*, 260 Ala. 136, 69 So. 2d 426.

In the case of *State v. Alabama Educational Foundation*, supra, the Court stated:

"Tax upon property is not only a personal charge against the taxpayer (*Union Bank & Trust Co. v. Phelps*, 228 Ala. 236, 153 So. 644; *Perry County v. Selma, M. & M. R. R. Co.*, 58 Ala. 546), but it must be paid by the one who owns the property at the beginning of the tax year, who is personally bound to pay it, whatever may occur as to its ownership thereafter or its physical status *Swann v. State*, 77 Ala. 545; 61 C. J. 171, 172 § 126, note 65; *People of New York v. Tax & A. Commissioners*, 104 U. S. 466, 26 L. Ed. 632.

"After it becomes an obligation fixed by those incidents, it cannot be remitted. Ownership on October 1st is the circumstance which fixes a liability for the succeeding years' assessment, though it may not then be assessed.

"We think that section 100 applies whether the liability is due or not, if it is fixed. There is a personal liability for ad valorem taxes on property by its owner on October 1st, for the succeeding year, though the amount is not then ascertained, and the Legislature is powerless to relieve him of it by act effective after that date."

In Quarterly Report of Attorney General, Vol. 115, page 88, the case of *U. S. v. State of Alabama*, supra, is quoted from as follows:

"After referring to the provisions of Title 51, Section 884, Code of Alabama 1940, Recompiled 1958, the Supreme Court of the United States in the case of *United States v. State of Alabama*, 313 U. S. 274, 61 S. Ct. 1011, stated:

" 'There is no question, however, as the Government concedes, that the state statute purports to impose a lien as of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. "It follows the land in the hands of the vendee, all persons being chargeable with a knowledge of its existence." *Driggers v. Cassady*, 71 Ala. 529, 534. See, also, *Swann v. State*, 77 Ala. 545; *State v. Alabama Educational Foundation*, 231 Ala. 11, 16, 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified.

" 'We make no exception of the tract conveyed to the United States on the tax day, October 1, 1936, as we think the state statute, as contended by the State, is to be deemed effective from the moment the tax day began. See *Beck v. Johnson*, 235 Ala. 323, 324, 179 So. 225.' "

Therefore, in accordance with the court rulings, the respective owners of the property deeded to the State of Alabama after October 1, 1963, by the deeds and on the dates indicated in your request cannot be relieved from liability for ad valorem tax for the tax year 1964 (October 1, 1963-September 30, 1964) on such property except by payment of the tax due.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 4, 1965

Honorable Paul J. Hooton
City Attorney
City of Roanoke
Roanoke, Alabama

Appropriations — Funds — Municipalities

A municipality may contribute funds to the industrial development board of such municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated April 21, 1965, is as follows:

“As City Attorney for the City of Roanoke, Alabama, I would like to ask for an opinion or Ruling on the following question:

“Recently under the Wallace Act a new one million and a quarter Industry has been located very near to the City of Roanoke, Alabama: And upon lands formerly belonging to the City of Roanoke, same bought for an Industrial site: The City under proper Resolution sold said land to The Industrial Development Board of the City of Roanoke, Alabama:

“Upon the site so sold to said Board by the City, such Plant was located, and said plant is in operation: Since the set up of said New Industry under the Wallace Act, it has been decided to build and there is in the process of being constructed an extensive addition to said New Industry: However one of the items in the matter of the Addition was that either the City or The Industrial Board acquire the right of way for a Railroad Side track or Spur Track to the Site of the New Industry.

“The Board not having any funds, or lacking such funds by far in the amount needed to obtain the right of way for such Spur Track to the site of the New Industry and its addition; Can the City of Roanoke, Alabama from its funds and resources obtain such Right of Way, or furnish the money or funds to acquire the Right of Way for such Spur Track, the sum being in an approximate amount of and in the neighborhood of \$2,000.00?

“Also, if the need be, can the City or the Industrial Board acquire by Condemnation this right of way, if the land owners do not and cannot with the City or Board come to an agreement as to the price

of such Right of Way, or come to an agreement for the purchase of the lands to be used in said Right of Way for such Spur Track?

"The matter at the moment is of somewhat serious import to the City of Roanoke, Alabama, and the Industrial Development Board, hence this query or request for an opinion from your office."

You stated in our telephone conversation of April 30, 1965, that the Industrial Development Board of the City of Roanoke, was created under the provisions of Act No. 648, Acts of Alabama 1949, page 991, as amended. Said statute is now codified as Title 37, Chapter 17, Code of Alabama 1940, as Recompiled 1958. You also withdrew that portion of your request which concerns the authority of said Industrial Development Board to acquire property by eminent domain.

In holding that a county may make appropriations to a municipal industrial development board, the opinion reported in Quarterly Report of Attorney General, Vol. 113, page 36, states:

"Title 37, Section 816, Code of Alabama 1940, Recompiled 1958, declares it to be the legislative intent that the main purpose of an Industrial Development Board is the promotion of industries and the development of trade by inducing manufacturing, industrial and commercial enterprises to locate in this State, and further the use of its agricultural products and natural resources."

* * * * *

"It is recognized that a municipal corporation, . . . may engage in the advertisement and promotion of the community when so authorized by the Legislature. 37 Am. Jur., Municipal Corporations, Section 12, Page 740. See also 79 A. L. R. 466."

Act No. 869, Acts of Alabama 1953, page 1167, authorizes a municipality to advertise any of its functions or undertakings both within and without its corporate limits.

Act No. 300, Acts of Alabama 1961, page 2361, authorizes a municipality to use its funds to promote industries within its police jurisdiction and elsewhere within the county not more than fifteen miles from the corporate limits of the municipality.

Therefore, I am of the opinion that the City of Roanoke may contribute funds to the Industrial Development Board of said City, such funds to be used by said Board to obtain the right-of-way to which your request refers. Opinion to Honorable John E. Adams, Jr., County Solicitor, Clarke County, under date of December 17, 1963 (not reported).

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 18, 1965

Honorable Phillip J. Hamm
Commissioner of Revenue
Department of Revenue
Administrative Building
Montgomery, Alabama

Taxation — Income Tax — Exemptions — Military and
Naval Affairs

1. Combatant activities or hostilities in the Vietnam
combat zone commenced on January 1, 1964.

2. Compensation for full-time military or naval service
anywhere was and has been exempt from Alabama in-
come tax on and since January 1, 1964, and will be so
exempt for six months after the termination of such
hostilities.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of May 10, 1965, is
as follows:

"On April 24, 1965, by Executive Order No. 11216, the President
declared Vietnam to be a combat zone for the purposes of section
112 of the Internal Revenue Code of 1954. Copy of said Executive
Order is attached.

"Title 51, section 374, as amended, Code of Alabama 1940, exempts
from State income tax compensation for full-time military or naval
service during a time when the United States is at war with a
foreign state or at or during a time when the United States is or
shall be engaged in hostilities with any foreign state, whether as
a result of a declared war or not.

"It is requested that you give me your official opinion as to whether
or not the compensation for full-time military or naval service is
exempt from State of Alabama income tax, and, if so, the effective
date of such exemption."

"
" THE WHITE HOUSE
" EXECUTIVE ORDER
" 11216

"Designation of Vietnam and waters adjacent thereto as a combat
zone for the purposes of Section 112 of the Internal Revenue Code
of 1954.

"Pursuant to the authority vested in me by Section 112 of the Internal Revenue Code of 1954, I hereby designate, for the purposes of that section, as an area in which armed forces of the United States are and have been engaged in combat:

"Vietnam, including the waters adjacent thereto within the following-described limits: From a point on the east coast of Vietnam at the juncture of Vietnam with China southeastward to 21 Deg N. Lat., 108 Deg 15' E Long.; thence southward to 18 Deg N. Lat., 108 Deg 15' E. Long.; thence southeastward to 17 Deg 30' N. Lat., 111 Deg E Long.; thence southward to 11 Deg N. Lat., 111 Deg E Long.; thence southwestward to 7 Deg N Lat., 105 Deg E Long.; thence westward to 7 Deg N Lat., 103 Deg E Long.; thence northward to 9 Deg 30' N Lat., 103 Deg E Long.; thence northeastward to 10 Deg 15' N Lat., 104 Deg 27' E Long.; thence northward to a point on the west coast of Vietnam at the juncture of Vietnam with Cambodia.

"The date of the commencing of combatant activities in such area is hereby designated as January 1, 1964.

"

LYNDON B. JOHNSON

"THE WHITE HOUSE

"APRIL 24, 1965"

In order to understand the effect of Executive Order No. 11216 with respect to Federal income tax, section 112 of the Internal Revenue Code of 1954, is quoted, in pertinent part, as follows:

"§ 112. Certain combat pay of members of the armed forces (a) Enlisted personnel. — Gross income does not include compensation received for active service as a member below the grade of commissioned officer in the Armed Forces of the United States for any month during any part of which such member —

"(1) served in a combat zone during an induction period, . .

"(b) Commissioned officers. — Gross income does not include so much of the compensation as does not exceed \$200 received for active service as a commissioned officer in the Armed Forces of the United States for any month during any part of which such officer —

"(1) served as a combat zone during an induction period, . .

"(c) Definitions. — For purposes of this section — . .

"(2) The term 'combat zone' means any area which the President of the United States by Executive Order designates, for purposes of this section or corresponding provisions of prior income tax laws,

as an area in which Armed Forces of the United States are or have (after June 24, 1950) engaged in combat.”

Under the above Executive Order and section 112 of the Internal Revenue Code, it appears that compensation received on and after January 1, 1964 by members of the Armed Forces of the United States for service in the combat zone specified, subject to the \$200 limitation with respect to commissioned officers, is exempt from Federal income tax.

Prior to an amendment in 1953, Title 51, section 374, Code of Alabama 1940, provided, in part, as follows:

“ . . . provided, however, that money paid by the United States to a person as compensation for military service rendered by him to the United States at or during a time when the United States is at war with a foreign state or within six months after the termination of such a war shall not be subject to income taxes levied by the state of Alabama for the calendar year 1945 or any subsequent year.”

On December 20, 1950, the President by Executive Order No. 10195 designated the Korean combat zone and described the limits thereof by degrees of latitude and longitude in the same manner as are the limits of the Vietnam combat zone in Executive Order No. 11216. Under Executive Order No. 10195, compensation received by members of the Armed Forces for service in the Korean combat zone was exempt from Federal income tax.

On March 12, 1952, this office rendered an official opinion reported in Quarterly Report of the Attorney General, Volume 66, page 85, interpreting the above proviso in section 374, *supra*. In holding that the period of participation of the United States in the Korean conflict constituted “a time when the United States is at war with a foreign state” within the meaning of section 374, *supra*, as it then read, the opinion stated:

“It is my conclusion that the period of the present Korean conflict — from June 24, 1950, to the present — is a ‘time when the United States is at war with a foreign state,’ within the intendment of Section 374, as amended, *supra*. Compensation received by persons from the United States for military service rendered to the United States during such time is exempt from income taxes levied by the State of Alabama. . .

“It would be well to point out, however, that the conclusion reached herein extends only to those whose military service involves a full-time active duty status. To such persons, the tax exemption afforded by Section 374, as amended, *supra*, is available.”

The above opinion did not limit the exemption from State income tax to compensation for service in the combat zone.

In the case of *State v. Gibson*, 258 Ala. 512, 64 So.2d 75, decided March 19, 1953, the question was whether the pay received by an officer in the organized Naval Reserve Corps of the United States for the year 1949 was subject to State income tax in view of the proviso of section 374, *supra*. In holding that such compensation was exempt, even though the reserve officer was not on full-time active duty, the Supreme Court stated:

"That the United States was 'at war' with a foreign state in 1949 seems clear to us. Though the actual hostilities between this country and our enemies ceased in 1945, we were still at war. Our armies, navies, and air forces, exercising our war power, were still abroad and no peace terms had been made with our enemies. This status prevailed with respect to Japan until the treaty of peace was signed September 8, 1951, and with respect to Germany until peace was proclaimed by the President after a joint resolution passed by Congress October 19, 1951. . . .

"The second contention must also be resolved against the appellant. This argument is that compensation for military service rendered by appellee to the United States, etc., was intended to apply 'only to full-time military service in the armed services of the United States and not to organized reservists or national guardsmen, etc., who were not on a full-time military service status' and that appellee was not on such latter status.

"The statute is *sui generis*. It makes no distinction between personnel on active duty, either in the regular or reserve of any branch of the armed services, but merely states that compensation for military service rendered by any person to the United States when it is at war is not taxable. We have shown that in 1949 that was the status of our government and the statute is so plain and unambiguous as to not call to the aid any of the rules of statutory construction. The court must give the statute its meaning as imparted by the clear terms used. *Hale v. State*, 237 Ala. 191, 186 So. 163. It is our view that the proviso in the statute applies to appellee's compensation just as it would were he on active duty."

The above court decision superseded the opinion of the Attorney General dated March 12, 1952 insofar as that opinion limited the exemption to compensation received for full-time military or naval service.

Following the *Gibson* case, *supra*, the Legislature by Act No. 872, Acts of Alabama 1953, page 1168, approved September 19, 1953, amended the proviso in section 374, *supra*, to read as follows:

". . . provided, however, that money paid by the United States to a person as compensation for full-time military or naval service rendered by him to the United States at or during a time when the United

States is at war with a foreign state, or at or during a time when the United States is or shall be engaged in hostilities with any foreign state, whether as a result of a declared war or not, or within six months after the termination of such a war or hostilities shall not be subject to income taxes levied by the state of Alabama for the calendar year 1945 or any subsequent year. For the purpose of this section, 'full-time military or naval service' shall not include periodic drill periods or summer encampments of short duration."

It is to be noted that the exemption now is limited to compensation for full-time military or naval service, and is extended to such compensation paid at or during a time when the United States is at war or is or shall be engaged in hostilities with any foreign state, whether as a result of a declared war or not, or within six months after the termination of such a war or hostilities.

Although the exemption is now limited to compensation for full-time military or naval service, the exemption is effective at or during a time when the United States is or shall be engaged in hostilities with any foreign state whether as a result of a declared war or not. In this respect, the exemption is somewhat broader than it was prior to the 1953 amendment. Also, section 374, *supra*, does not limit the exemption to compensation received for active service in a combat zone as does the Federal statute, section 112, *supra*; it is applicable to compensation received for full-time military or naval service anywhere.

Although it may be desirable that there be uniformity between State and Federal tax statutes, *Bashinsky v. Sparks*, 274 Ala. 166, 146 So. 2d 303, a State statute which is not uniform with a Federal statute cannot be made so by judicially writing something into the statute that is not there. *State v. Calumet & Hecla Consolidated Copper Co.*, 259 Ala. 225, 66 So.2d 726. In the *Gibson* case, *supra*, the Court rejected the contention made by the State that the exemption was limited to compensation for full-time military or naval service simply because the statute in plain language did not so provide. As pointed out above, following the *Gibson* case, *supra*, the Legislature amended section 374, *supra*, and limited the exemption to compensation for full-time service. To further limit the exemption to compensation for service in a combat zone is a matter for the Legislature and cannot be done by judicial interpretation. In view of the opinion of the Attorney General on March 12, 1952 and the decision of the Supreme Court in the *Gibson* case, *supra*, on March 19, 1953, if the Legislature had intended to limit the exemption to compensation for service in a combat zone, it could have so provided in the 1953 amendment to section 374, *supra*, approved September 19, 1953.

There can be no doubt that the United States is now and has been engaged in hostilities with a foreign state in Vietnam. Executive Order No. 11216 proclaims the commencing of combatant activities in the combat zone to be January 1, 1964.

In view of the provisions of section 374, as amended, supra, the Court's decision in the **Gibson** case, supra, the opinion reported in Quarterly Report of the Attorney General, Volume 66, page 85, supra, and Executive Order No. 11216, it is my opinion that compensation for full-time military or naval service anywhere was and has been exempt from Alabama income tax on and since January 1, 1964, and will be so exempt for six months after the termination of such hostilities.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 24, 1965

Honorable H. B. Enzer
Board of Equalization
St. Clair County
Margaret, Alabama

Homesteads — Tax Assessors — Boards of Equalization

1. Homestead exemption cannot be claimed by person not occupying and residing in house claimed for homestead exemption purposes.

2. It is the primary duty of tax assessor to remove claim of homestead exemption of house from assessment list if facts justify such action — Board of Equalization may do likewise under facts discussed.

Opinion by Assistant Attorney General Payne

Dear Sir:

Your request dated May 18, 1965, for an official opinion of this office reads as follows:

"I am a member of the Board of Equalization, St. Clair County and I would like a decision of the Attorney Generals Office on two questions:

"1. A man owns his own home and is Home Stead Exemption. He bought two more houses, for taxes, and is getting Home Stead Exemption on them also. Is this permissible due to the fact that the previous owner may redeem the property?

"2. Is it not the duty of the Board of Equalization to take the Home Stead Exemption off the two houses not lived in by the owner, or is that the sole duty of the Tax Assessor?"

Your first question numbered one is answered in the negative. It is obvious from the facts stated that the purchaser of the two houses at the tax sale does not reside in them and, therefore, there is no basis for his claim of exemption as to these properties. In Words and Phrases, Volume 19, page 600, it is stated:

“‘Homestead’ means the seat or mansion, and embraces the idea of actual occupancy. *Turner v. Turner*, 18 So. 210, 107 Ala. 465, 54 Am. St. Rep. 110.” (Emphasis Supplied)

The above expresses the law of this state with respect to the conception of the meaning of the term “homestead.” The fact that the previous owner or owners of the two houses in question may redeem the property in the future does not accord the purchaser at the tax sale the right to claim homestead exemption previously granted to the prior owner. Entitlement to claim the homestead exemption must be established by the purchaser, in due course, in his own right as the law requires in such cases. The person claiming “homestead” exemption under the constitutional definition of the quoted word must not only own the premises but must in addition, actually occupy the same. Quarterly Report of Attorney General, Volume 8, page 284. The facts stated by you negate any such right on the part of the purchaser.

Your question numbered two is answered in the following manner: Title 51, Code, Recompiled 1958, Sections 37 through 77, is very broad in that it provides for the tax assessor to see that all property that is subject to taxation shall be listed (including the listing of claim for homestead exemption by the taxpayer, Section 39); Section 41, provides that the assessor shall inquire of the taxpayer as to items of property and subjects of taxation owned by such taxpayer, including property exempted from taxation. In my opinion, it necessarily follows that where a tax assessor is apprised of facts indicating that a taxpayer is not entitled to a claim of homestead exemption that has been listed with him, then, in such case, he should remove and disallow any such claim. Certainly, it seems to me that the tax assessor of your county has knowledge of the situation as discussed in your letter of request for opinion from this office, and should remove the claim of exemption involving the two houses to which you make reference.

The duty and authority of Boards of Equalization is governed by Title 51, Code, Recompiled 1958, Sections 88 through 113, as amended. The Boards have a rather broad discretion with respect to reviewing assessment and in making certain adjustments as provided in the statute. It is the duty of the Board to inspect, review, and revise the value of all property listed with the tax assessor, etc. Section 105 of the statute provides for the Board “to carefully examine and inspect all tax returns and assessments delivered to it by the county tax assessor.” The aforementioned section permits the Board to make a proper tax return against any taxpayer whom the Board finds has neglected to make a return “or

has omitted from his return any property that should be returned, ...” Applying like reasoning, as I see it, if the Board finds from a review of a taxpayer’s return that he has listed property for homestead exemption purposes when, in fact, such property is not entitled to such exemption status, then the Board would be within its authority in deleting and disallowing the claim of homestead exemption. The tax assessor and the Board of Equalization have a common duty in the assessment of taxes and that is to see to it that the assessment lists reflect the true picture as to the properties listed.

In summary, it is my conclusion that either the tax assessor or the Board of Equalization could, in any appropriate case, remove the claim of homestead exemption as to any property which from the facts does not justify such claim.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 11, 1965

Hon. Albert J. Lingo

Director

Dept. of Public Safety

State of Alabama

Montgomery, Alabama

Justice of the Peace — County Court — Judgments —
Fines — Costs & Fees

1. Neither a Justice of the Peace nor a County Court
may accept partial payment of fines.

2. Neither a Justice of the Peace nor a County Court
may prorate the fine that has been assessed against a
defendant.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your letter to me of recent date is as follows:

“I would like to have your opinion as to whether or not a court can
accept partial payment of fines.

“We have numerous courts throughout the state which are accepting
partial payments. Many of them are reducing the original offense
after conviction, if they have accepted partial payment and the de-
fendant cannot be located for balance of amount imposed.

"I would also like your opinion regarding proration of fines. Is it legal to prorate fine and cost where a partial payment has been accepted and not change or reduce the offense?"

"Your opinion in this matter will be appreciated."

As I read your letter, you have asked me to answer two questions, which are as follows:

1. May a court accept partial payment of fines?
2. May a court prorate the fine and cost where a partial payment has been accepted and not change or alter the offense?

The answer to your first question is in the negative.

The law in Alabama is that when a defendant is convicted of an offense and a fine and costs are assessed against him, he must pay the fine and costs or obtain leave of the court to confess the judgment with good and sufficient sureties for the fine and costs. If neither is done, the defendant should be placed in the county jail or sentenced to hard labor for the county to pay the fine and costs. See Title 15, Sec. 341, 342, Code of Alabama 1940, as Recompiled 1958.

The above principle of law applies to Justices of the Peace courts and County courts, except that a Justice of the Peace is without authority to sentence a person to hard labor for the county for non-payment of costs. Quarterly Report of the Attorney General, Vol. 22, page 201; Quarterly Report of the Attorney General, Vol. 37, page 102; an opinion written to Herman Watson, Jr., Solicitor, 5th Judicial Circuit, Lafayette, Alabama, August 14, 1963, and an opinion written to E. T. Webster, Justice of the Peace, Brantley, Alabama, November 17, 1958.

Hence, the answer to your first question is that a Justice of the Peace Court or a County Court has no authority to accept partial payment of fines.

Your second question is answered in the negative also.

In answering your first question, I concluded that a Justice of the Peace Court and County Court may not accept partial payment of fines. I am also of the opinion that neither of these two courts may prorate the fine that has been assessed against a defendant if an attempt is made to accept a partial payment of the fine.

This office has held that where a person has been sentenced to hard labor for the county for non-payment of the fine, and commences serving the sentence; then comes in and pays the fine, the full amount of the fine must be paid. Biennial Report of the Attorney General, 1930-32,

page 60. However, this same opinion holds that credit will be allowed a defendant who has been sentenced to hard labor for the county for non-payment of costs. Also, see an opinion of this office to Horsley White, Clerk, Circuit Court Chilton County, Clanton, Alabama, September, 9, 1960.

Therefore, in answer to your second question, it is my opinion that a Justice of the Peace or County Court judge cannot accept partial payment of fines, and neither can they prorate the fine assessed against a defendant.

For example, a Justice of the Peace, upon finding a person guilty of a traffic offense, sentences that person to pay a fine within the limits prescribed by law and the costs of the proceeding, whatever they may be. If the convicted person is unable to pay the fine and costs and cannot confess the judgment with good and sufficient sureties, the justice should sentence the defendant to hard labor for the county for the fine. Costs can only be collected by execution against the defendant.

As to changing or reducing the sentence, a Justice of the Peace cannot alter his judgment after the day of its rendition. **Bekurs vs. Bumper Service**, 271 Ala. 110, 122 So. 2d 727.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 23, 1965

Honorable Peter J. Palughi
Assistant City Attorney
City of Mobile
Mobile, Alabama

Licenses — Municipalities — Vending Machines.

A municipality may impose a privilege license upon persons who maintain postage stamp vending machines except where such machines are maintained by a business on a nonprofit basis for emergency use by its employees.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated May 27, 1965, is as follows:

"The City Commission has requested that I obtain an Attorney General's ruling as to whether or not Item 414(e) of our License Code (see attached excerpt) concerning machines vending postage stamps is legal and valid under Title 37, Section 749(1) of the **Code of Alabama, Recompiled 1958**. The License Department of the City of Mobile feels that the legality of our license provision for the operation of these machines hinges on the interpretation of the first proviso of

Section 749(1). The comma appearing after the words: 'Machine vending postage stamps,' separates that descriptive phrase from the following phrase: 'or other necessary articles on a non-profit basis for emergency use only by the employees of such person, firm or corporation.'"

That portion of the license code of the City of Mobile, which is attached to your request imposes a privilege license upon persons who maintain postage stamp vending machines in the amount of Two Dollars per annum for each machine.

The statute to which your request refers was originally enacted as Section 1 of Act No. 393, General Acts of Alabama 1947, page 290.

This office held in an opinion rendered to Mrs. Verlon Nelson, Clerk, Town of Thorsby, under date of July 25, 1962 (not reported), that said statute authorizes a municipality to impose a privilege license on the operation of all vending machines except those machines which are exempted from such a license by the two provisos contained in Section 1 of Act No. 393, *supra*.

The first proviso of Section 1 of Act No. 393, *supra*, to which your request refers reads as follows:

" . . . Provided however that such city or town shall not be authorized or empowered to levy or collect a license from any such persons, firm, company, corporation or association, receiver or trustee who possess and operate or who maintain for operation by others coin operated gas meters, coin operated telephones, machine vending postage stamps, or other necessary articles on a non-profit basis for emergency use only by the employees of such person, firm or corporation. . . ."

In the case of *Garlington v. City of Birmingham*, 23 Ala. App. 282, 125 So. 208, the Court held that the existence of an exemption from a privilege license will not be presumed and any uncertainty as to the scope of the exempting clause will be resolved against the exemption. See also *State v. Sellers*, 30 Ala. App. 512, 9 So. 2d 19.

I am of the opinion that Act No. 393, *supra*, expresses a legislative intent to exempt from municipal license taxes only those postage stamp vending machines which are maintained by a business on a non-profit basis for emergency use only by its employees.

Therefore, you are advised that the license code of the City of Mobile imposes a privilege license upon persons who maintain postage stamp vending machines with the exception of such machines maintained by a business on a nonprofit basis for emergency use only by its employees.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

I N D E X

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INFORMAL OPINIONS

During the period covered by this Quarterly Report of the Attorney General, April 1, 1965 through June 30, 1965, the Attorney General rendered the following informal opinions. These informal opinions are not published in the Quarterly Report.

Subject Matter	Addressee	Date	File No.
ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD			
Licenses — Colleges	G. H. Wright	May 17	646
Sales — Municipalities	L. H. Gunter	Apr. 27	587
Welfare Funds — Procedure	James E. Caldwell	June 1	ABC Bd.
Wine — Manufacture	W. M. Easter	May 5	606
COSTS AND FEES			
Clerks of Circuit Courts —			
Search Warrants	Howard Kirby	May 24	617
Conviction — Dismissal	Albert J. Lingo	Apr. 29	Dept. of Pub. Safety
Cullman County — Inferior Court	Ruth Gasser	May 28	709
Docketing Fees — Circuit Clerks	L. W. Jinks	Apr. 7	543
Grand Juries — Clerks of Circuit Courts	Ray Boseman	May 5	619
Highway Patrol — Arrests	Albert J. Lingo	Apr. 23	Dept. Pub. Safety
Highways — Distribution	John Graves	Apr. 7	St. Compt.
Sheriffs — Indictments	C. Bennett McRae	May 4	608
Sheriffs — Sales	M. S. Butler	Apr. 21	573
Witnesses — Nonsupport	Howard Kirby	May 6	617
COUNTIES			
Attorneys — Judges of Probate	Nelson Allen	Apr. 5	536
Buildings — Painting	W. D. Ritch	Jun. 22	742

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Convicts — Sheriffs	C. P. Walker	June 9	398
Industrial Development — Appropriation	David M. Nettles	May 21	660
Judges of Probate — Clerical Assistants	Paul C. Jordan	May 4	610
Opportunity Act — Appropriations	Winston Stewart	June 9	716
Supplies — Co. Supt. of Ed.	Tom W. Turner	June 7	711
Supplies — Courts	Frank B. Watson	Apr. 6	538
Telephones — Legislature	H. G. Allen and Tom Drake	Apr. 7	542
Telephones — Legislature	Calvin L. Vest	Apr. 21	601
CRIMINAL LAW			
Constables — Bail	Emmett F. Lollar	Apr. 28	600
Firearms — Officials	Clyde Manasco	May 18	645
Highways — Cash Bond	Tom Radney	June 8	712
Highways — Moving Traffic	Jack W. Torbert	May 26	677
Justices of Peace — Highways	Albert J. Lingo	June 2	Dept. Pub. Safety
Justices of Peace — Jurisdiction	E. D. Robertson	June 15	722
Lotteries — Baseball Machines	Kenneth L. Richey	May 24	669
Pest Control — Prosecution	T. J. McBride	June 16	723
Worthless Checks — Justices of Peace	J. F. McKinley	May 12	628
ELECTIONS			
Corrupt Practice — Electioneering	S. Charles Walls, Jr.	Apr. 27	586
Mobile — Candidates	Peter J. Palughi	May 17	264
Residence — Counties	T. C. Almond	Apr. 2	491
Residence — Re: Registration	Wiley A. Wise	May 12	630
Special — Voters List	C. D. Cameron	May 19	144
Tuscaloosa — Laws	J. Wagner Finnell	May 12	295
Voters — Convictions	W. M. Gwin	Apr. 12	570

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HIGHWAYS AND HIGHWAY DEPARTMENT			
Rights of Way — Prescription	Billy B. Turner	Jun. 11	717
Safety Coordinating Committee — Funds	Ralph P. Eagerton	May 12	Dept. Ex. of Accts.
HOSPITALS			
Appropriations — Counties	G. H. Stacy	May 26	46
County — Supervision	Paul J. Hooton	Jun. 22	380
Directors — Duties	Paul J. Hooton	Apr. 23	380
Insane Persons — Conveyances	Tennessee Valley Authority	May 12	629
Municipalities — Compensation	Glenn H. Hearn	Jun. 21	733
Rentals — Doctors	Carl H. Merrill	May 24	272
Tubercular — Insurance	Robert K. Oliver	May 10	626
INSURANCE			
Deposits — Release	Mary T. Garner	Apr. 22	Dept. St. Treas.
Deposits — Transfer	Mary T. Garner	Apr. 5	Dept. St. Treas.
Dividends — Corporations	Walter S. Houseal	Apr. 19	Ins. Dept.
MUNICIPALITIES			
Auditor — Employment	E. R. Caldwell	Jun. 15	718
Firemen — Time	Frank Gwaltney	Apr. 20	575
Ft. Payne — Departments	Fred H. Purdy	Jun. 2	687
Hartford — Corporate Limits	A. A. Smith	Apr. 5	531
Incorporation — Procedure	Mrs. Guy Traylor	Jun. 21	730
Securities — Refunding	Leonard Beard	Jun. 22	Dept. Plan. & Ind. Dev. Bd.
Streets — Names	Roy M. Smith	Jun. 21	732
Subdivisions — Water	J. H. Robertson	Jun. 7	710

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OFFICERS AND OFFICES			
Attorneys — Milk Control Board	James G. McLean	May 11	
City Attorneys — Records	David M. Enslen	Apr. 2	529
Corporations — Infants	Ashford Todd	Apr. 20	475
Corporations — Subscriptions	Ashford Todd	May 7	475
Councilmen — Insurance	Kenneth B. Roy	Jun. 21	734
County Court Reporter	W. W. Weatherford	Apr. 6	506
Dothan — Civil Service	Walter W. Moreland	May 25	213
Hospitals — Civil Defense	Morgan Reynolds	Jun. 9	713
Juries — Qualifications	W. H. Golden	Jun. 9	715
Legislature — Parties	E. A. Grouby	Jun. 4	695
Mayor — Insurance	John Mullins, Jr.	May 4	530
Mortgages — Satisfaction	Bernard A. Reynolds	Jun. 17	727
Personnel Board — Railroads	James A. Simpson	May 19	649
Population — Compensation	Calvin L. Vest	Apr. 21	601
Sheriffs — Secretary	William L. Woodham	Apr. 29	439
SCHOOLS			
Board of Education — Compensation	Wayland Cooley	May 6	621
Bookmobile — Insurance	Bessie Sasser	Apr. 22	580
Bus Drivers — Compensation	Austin R. Meadows	May 5	Dept. Ed.
Construction — Bonds	Robert E. Cunningham	May 19	655
Industrial — Funds	George Young	Apr. 27	585
Pupils — Overpass	Oscar M. Zeanah	May 26	675
Teachers — Co. Bd. of Ed.	Earl York	Jun. 30	753
Teachers — Local Acts	Ulie B. Sullivan	May 26	647
Teachers — Retirement	Virgil Nolen Price	Apr. 5	533

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STATE AND STATE DEPARTMENTS			
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Internal Improvement Lands — Funds	Claude D. Kelley	Jun. 29	Conserv. Dept.
Muscle Shoals Grants — Patents	Jim Smith	May 6	613
State Prison — Statutes	Harry Nelson	Apr. 9	551
TAXATION			
Churches — Deeds	J. H. Brockholdt	May 7	Dept. Ed.
Documentary Tax — Assignments	W. H. Knight	Jun. 24	737
Filing Tax — Churches	Nelson Allen	Jun. 17	536
Filing Tax — University of Alabama	J. Paul Meeks	Apr. 1	158
House Trailers — Military	S. K. Adams	May 13	641
Licenses — House Trailers	Harvey Langham	May 3	607
Sales Tax — Battleship Commission	H. M. Aldridge	May 27	674
Tax Sales — Redemption	Marie D. Rivers	Jun. 4	696
Water Authority — Exemptions	James L. Hall	Jun. 28	747